Filed 3/22/10 Gosvener v. Pacheco CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

RICHARD GOSVENER, as Successor Trustee, etc., Plaintiffs and Respondents, v. MARY PACHECO, Defendant and Appellant.	F057818 (Super. Ct. No. VPR043799) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Patrick J. O'Hara, Judge.

Dooley, Herr, Peltzer & Richardson, Leonard C. Herr and Ron Statler for Defendant and Appellant.

Ruddell, Cochran, Stanton, Smith, Bixler & Wisehart, D. Zackary Smith and Matthew W. Bixler for Plaintiff and Respondent Richard Gosvener.

Pape & Shewan, Jeffrey B. Pape and Scott R. Shewan for Plaintiff and Respondent Frank Rocha, Jr.

-ooOoo-

In response to a petition for instructions, the trial court approved the sale of a partnership interest in Hazel Rocha & Son to the surviving partner, respondent Frank Rocha, Jr., at a price that was set pursuant to a binding appraisal process specified in the partnership agreement. Appellant Mary Pacheco appeals, contending the appraisal process resulted in a determination of market value that violated Corporations Code[1] section 16701, and therefore the trial court erred in approving the sale at that price. We disagree. Because the partnership agreement provided a specific method for determining market value for purposes of setting the buyout price, and that method was followed in this case, section 16701 was inapplicable. The order of the trial court is affirmed.

FACTS AND PROCEDURAL BACKGROUND

The material facts are not in dispute. Frank Rocha, Jr. worked on the family dairy in an equal partnership with his mother, Hazel Rocha, from 1974 until Hazel's death in August of 2006. The partnership was (and is) known as Hazel Rocha & Son. Appellant, who is Frank Rocha Jr.'s sister, has never been involved in the operation of the dairy.

In 1989, Hazel Rocha and Frank Rocha Jr. executed a First Amended Articles of Partnership (hereafter the partnership agreement). One of the purposes of the partnership agreement was to ensure a smooth transition in the event of the death or withdrawal of one of the partners and to allow for continuous operation of the dairy. Among other things, the partnership agreement gave the surviving partner an option to purchase the other's interest in the event of death. Specifically, paragraph 4.04 of the partnership agreement provided, in part, as follows: "[U]pon the death of First Party or Second Party, the remaining party shall have an option to purchase the interest of the deceased … in the assets and goodwill of the partnership business by paying to such

---

[1] Unless otherwise indicated, all further statutory references are to the Corporations Code.

party or the person legally entitled thereto *the value of such interest determined as provided in Paragraph 4.05* of these Articles." (Italics added.)

As the above-recited provision of the partnership agreement makes clear, if such option to purchase the decedent's interest in the partnership was exercised by the surviving partner, the purchase price was to be determined as provided in paragraph 4.05 of the partnership agreement. Paragraph 4.05 provides that the purchase price of the decedent's interest shall be "the value of such interest determined as follows: [¶] … [¶]

> "B. The fair market value of the property belonging to the partnership shall be determined in the following manner:
>
> > "At the time that the remaining partner gives notice in the manner specified in Paragraph 4.04 of his exercise of the option to purchase, he shall appoint an appraiser. Within ten (10) days after receiving such notice[,] the person who will be legally entitled to receive the value of the partnership interest being appraised shall appoint an appraiser. If the two appraisers solely appointed shall be unable to agree on the value of such interest within sixty (60) days, they shall appoint a third appraiser. A decision in writing of any two of the three appraisers … shall be binding and conclusive of the parties hereto and any person legally entitled to receive the value of such deceased … partner's interest."[2]

Originally, Hazel Rocha and Frank Rocha, Jr. were each 50 percent partners in Hazel Rocha & Son. In 2000, Hazel Rocha assigned her one-half partnership interest to the Hazel Rocha Living Trust (the trust). Under the terms of the trust, upon Hazel

---

[2] In part C of paragraph 4.05, it summarizes what shall be included in the determination of value: "In determining the value of the partnership interest to be purchased, (1) the appraiser shall value all tangible assets of the partnership, including land if any, building, cows, fixtures, milk pool quota, automobiles and equipment at their fair cash market value; (2) all accounts receivable due to the partnership that are more than 180 calendar days old and not barred by the statute of limitations at one-half their face value; and (3) all accounts receivable due to the partnership that are less than 180 days old at their full face value."

Rocha's death her former 50 percent interest in the partnership would be divided equally between her two children, Frank Rocha, Jr. and appellant. Hazel Rocha died on August 16, 2006. At that time, co-respondent Richard Gosvener (hereafter the trustee) was named successor trustee of the trust.

By letter of his attorney dated November 7, 2006, Frank Rocha, Jr. notified the trustee's attorney that he (Frank Rocha, Jr.) was exercising his option as surviving partner to purchase the deceased partner's one-half interest. A dispute then arose between Frank Rocha Jr. and appellant whether the partnership interest was to first be distributed out of the trust to the trust beneficiaries, or whether Frank Rocha Jr. was to purchase the partnership interest directly from the trust. A petition for instructions was filed by the trustee to resolve the conflicting demands. On February 27, 2007, the trial court concluded that "Hazel Rocha intended that her interest in the partnership would be purchased by the remaining partner through her trust rather than after distribution to her trust beneficiaries," therefore the trustee was ordered to carry out the purchase and sale provisions of the partnership agreement. No appeal was taken from that order.[3]

Frank Rocha Jr. and appellant later agreed to a valuation date (of the partnership interest held by the trust) of April 10, 2008, instead of the August 2006 date of death. As recited above, for the purpose of determining market value in order to ascertain the purchase price, paragraph 4.05 of the partnership agreement required that one appraiser be selected by the surviving partner (the party exercising the option) and another appraiser be selected by the party who would receive the proceeds of the purchase. Frank

---

[3] This precludes any claim that the partnership agreement was inapplicable. The matter was decided below and was not appealed. Additionally, the issue was further abandoned by appellant's failure to raise it in her opening brief, as appellant did not specifically assert such claim until oral argument before us. (*Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 685 [issues not properly raised in opening brief are deemed forfeited].)

Rocha Jr. identified his selection of a business valuation appraiser (i.e., Thomas Hunt). Counsel for the trustee, rather than simply proceeding to appoint his own appraiser, wrote to appellant's counsel and provided a list of potential appraisers. Appellant's counsel wrote back to inquire whether appellant could select an appraiser not on the trustee's list, and the trustee's counsel replied that he would consider any nominations. Ultimately, appellant selected Mark Higgins as her choice of a business valuation appraiser. The trustee complied with that request, and Mark Higgins became the second appraiser.

As contemplated by the partnership agreement, the two appraisers independently conducted their own analysis of value and then met to determine whether they could reach a consensus. On October 20, 2008, they submitted a letter stating that they had, in fact, reached a consensus on the fair market value of a 50 percent partnership interest in Hazel Rocha & Son as of April 10, 2008.[4] It therefore was not necessary to bring in a third appraiser. The October 20, 2008, letter set forth the two appraisers' conclusion as to value, but did not disclose any of the analysis by which the conclusion was reached. The letter stated: "It is our opinion that the fair market value of a 50% general partnership interest in the Partnership, as of April 10, 2008, was equal to $2,312,000."

Appellant's counsel objected and instructed the trustee not to proceed with the sale until more information could be obtained to verify the correctness of the appraisers' conclusion. Further information was provided, including that the appraisers began their analysis by valuing the equity of the entire partnership at $5,826,000. One-half of that

---

[4] The term "fair market value" is generally understood to be "'*the highest price* on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.'" (*Escondido Union School Dist. v. Casa Sueños De Oro, Inc.* (2005) 129 Cal.App.4th 944, 980.) This was in essence the definition of "fair market value" used by the appraisers in their consensus report.

total was $2,913,000. From there, the appraisers then sought to determine the "fair market value" of the 50 percent interest by applying *discounts* based on lack of control and lack of marketability. One of the appraisers applied a discount of 10 percent for lack of control and a further discount of 10 percent for lack of marketability, yielding a "fair market value" of $2,360,000. The fact that the "consensus" amount was slightly lower than this figure indicates the second appraiser applied a slightly higher discount percentage.

Appellant disagreed with the use of any discounts, and objected to the sale because the price was based on an appraised value that had used discounts in the analysis of market value. To resolve the dispute, the trustee filed a petition for instructions. By order filed on April 21, 2009, the trial court approved the consensus statement of the two appraisers as to fair market value, which was $2,312,000. Since appellant was a trust beneficiary of only one-half of the trust's 50 percent interest (the other half going to Frank Rocha, Jr.), the trial court ordered that she receive $1,156,000 from the sale. The sale was ordered to proceed on these terms. Appellant filed a timely notice of appeal from the trial court's order.

DISCUSSION

Appellant contends that the trial court erred in approving the sale on the above terms because the use of discounts in determining market value allegedly violated the standards set forth in section 16701. Because the issue involves the question of what legal standard should be applied under a given set of facts, we apply a de novo review. (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888.)

General partnerships in California are governed by the Uniform Partnership Act of 1994. (§§ 16100, 16108, 16111.) Section 16103, subdivision (a), thereof provides as follows:

> "(a) Except as otherwise provided in subdivision (b), relations among the partners and between the partners and the partnership are

> governed by the partnership agreement. To the extent the partnership agreement does not otherwise provide, this chapter governs relations among the partners and between the partners and the partnership."[5]

This means that the partners, in their agreement, are "free to allocate responsibility [between] themselves as they see fit." (See *Victor Valley Transit Authority v. Workers' Comp. Appeals Bd.* (2000) 83 Cal.App.4th 1068, 1076.) Further, as the statute clearly articulates, the chapter (i.e., the Uniform Partnership Act of 1994) sets forth the default rules that govern only "[t]o the extent the partnership agreement does not otherwise provide." (§ 16103, subd. (a).)

Appellant contends that section 16701 governs the determination of the buyout price. Not so. As is evident from the discussion above, section 16701 will not apply if the *partnership agreement otherwise provides* a means of determining the buyout price. As correctly explained by one California law treatise: "The statutory provisions respecting a buyout of a dissociated partner's interest in the partnership are not included among those that may not be eliminated or varied by the partnership agreement. Accordingly, partners may provide in the partnership agreement … that the interest of a deceased partner may be purchased by the surviving partners for a stated sum or for an amount arrived at by a specified process or formula." (48 Cal.Jur.3d (2004) Partnership, § 104, p. 553, citing § 16103, fns. omitted.) This is not new law, but is a longstanding principle regarding buyouts of a deceased partner's interests in a partnership. (See *Wood v. Gunther* (1949) 89 Cal.App.2d 718, 727 ["It is well settled that partners may agree in their contract … that the interest of the deceased partner may be purchased by the surviving partners for a stated sum, or for an amount arrived at by a process or formula …. Under any of such situations the Uniform Partnership Law does *not* control"]; *Rankin v. Newman* (1896) 114 Cal. 635, 649.)

---

5 The limited exceptions to this rule, as set forth in subdivision (b) of section 16103, are plainly not applicable to the case at hand.

Here, the partnership agreement expressly provided a method or process by which the buyout price would be determined. Specifically, each party would select one appraiser, and if the two appraisers could not agree then a third appraiser would be appointed, with the opinion of any two appraisers binding on the parties as to the fair market value of the partnership interest. That process was followed here and the purchase price was thereby determined in accordance with the terms of the partnership agreement. No further inquiry is needed on our part.[6] We conclude the trial court did not err when it approved the sale of the partnership interest at the price arrived at by the selected appraisers.

DISPOSITION

The order of the trial court is affirmed. Costs on appeal are awarded to respondents.

_____
Kane, J.

WE CONCUR:

_____
Levy, Acting P.J.

_____
Cornell, J.

---

[6] We add that even if we were to review the reasonableness of the appraisers' conclusion as to the fair market value of the partnership interest, that conclusion would be readily affirmed by us. The explanatory material in the appraisal report amply confirms there were reasonable grounds for applying the discounts in reaching a decision as to fair market value. Moreover, appellant offered no evidence to the contrary.